IN THE HIGH COURT OF AUSTRALIA

O'BRIEN

V.

DUNCAN MOTOR COMPANY

REASONS FOR JUDGMENT

Judgment delivered at MELBOURNE

on MONDAY 17th OCTOBER 1955

(13)

W. M. HOUSTON, Govt. Print., Melb.

C.1978/55

FRANK JOSEPH O'BRIEN

v.

DUNCAN MOTOR COMPANY

ORDER

Appeal dismissed with costs.

FRANK JOSEPH O'BRIEN

V.

DUNCAN MOTOR COMPANY

JUDGMENT

FULLAGAR J.
KITTO J.
TAYLOR J.

FRANK JOSEPH O'BRIEN

V.

DUNCAN MOTOR COMPANY

JUDGMENT

FULLAGAR J.
KITTO J.
TAYLOR J.

The appellant is a cartage contractor carrying on business in the State of Western Australia and in January 1951 he purchased from the respondent a second-hand Ford V8 truck for the purposes of his business. During the next few months of the same year he found it necessary to purchase certain new parts from the respondent for the vehicle and in January 1953 there was still an outstanding indebtedness on this account. Accordingly, in that month the respondent commenced proceedings to recover this balance. The respondent's claim was met by a counterclaim which, in its final form, was based upon alleged breaches of terms of the contract for purchase. In the first place the appellant alleged an express oral warranty that the truck would be suitable for wheat carting. Secondly, it was said, it was a condition of the sale that the engine with which the vehicle was equipped was of merchantable quality and, finally, that it was an implied condition that the vehicle would be suitable for wheat carting. For reasons which it is unnecessary to relate the respondent's claim in the suit was not proceeded with and this appeal is concerned only with those questions which arise in relation to the appellant's counterclaim.

At the hearing the appellant failed to establish the existence of any express warranty but the learned trial judge was of the opinion that the truck had, within the meaning of sec. 14 (2) of the Sale of Goods Act of 1895, been bought by description and that there was, therefore, implicit in the sale a condition that it was of merchantable quality. His Honour also took the view that the appellant had made known to the respondent the particular purpose for which the vehicle was required so as to show that the former relied upon the latter's skill and judgment and that, in the circumstances of the case, there should be implied, pursuant to sec. 14(1) of the Act, a condition that the vehicle was reasonably fit for that purpose, that is to say, for "carting wheat by means of an attached semi-trailer".

The evidence established that prior to December 1950 the appellant was engaged in the cartage of bulk wheat from country centres to convenient ports in Western Australia, including Fremantle. In that month he contemplated the purchase of another vehicle and he noticed a second-hand Ford V8 truck in the respondent's premises. The respondent is a dealer in motor vehicles and at that time was an agent of the Ford Motor Company. After having seen the truck displayed for sale the appellant had some discussion concerning its purchase with one Duncan, the proprietor of the respondent firm. According to the appellant Duncan told him that the truck had been "gone through" and that a new engine had been fitted to it. The appellant said that he required the truck "for semi-trailer work for wheat hauling" and Duncan is alleged to have said that it would be quite suitable for such work. The appellant was not ready to purchase the truck at this stage and asked Duncan if he would hold the vehicle for him. This Duncan assented to, remarking that some minor

adjustments were necessary and that it would not be ready for delivery until after Christmas. On 20th January 1951 the appellant returned to the respondent's premises and again saw Duncan whereupon the sale was completed and, on the following day, the appellant took delivery of the vehicle. After reviewing the evidence to which we have briefly referred the learned trial judge expressed the view that the sale was subject to implied conditions of the character already mentioned. He pointed out that the expression "bought by description" may apply to specific goods as well as to future or unascertained goods and thereafter reached the conclusion on the facts that "the truck was bought by description although it was the only vehicle which was in the contemplation of the parties". It was sold, he said, "not merely as a vehicle but as a vehicle answering the description of a Ford 5-ton truck with a new V8 motor". In addition his Honour found present in the circumstances of the sale sufficient to lead him to the conclusion that there should also be implied a condition "that the truck was reasonably fit for carting wheat by means of an attached semi-trailer". Neither for the purposes of one sub-section of sec. 14 of the Sale of Goods Act nor the other did his Honour misdirect himself and, in the circumstances, his conclusions on those two matters were essentially conclusions of fact and we can see no valid reason why, as was contended by the respondent, these findings should be interfered with. But even if there is room for doubt concerning the validity of the finding that the sale was subject to an implied condition that the truck was reasonably fit for wheat carting by means of an attached semi-trailer it is of no consequence for the complaint of the appellant concerning the condition and performance of the truck would, if substantiated, establish a

substantial breach of a condition that it should be of merchantable quality and there is no doubt that his Honour was justified in finding that the sale was subject to such a condition.

As we have already said the truck in question was purchased by the appellant on 20th January 1951 and on the following day he took delivery of it. The engine with which the truck was equipped was of a type known as a Ford V8 engine consisting of two banks of cylinders mounted in a V-shaped block with the piston rods from each cylinder connecting with a crank-shaft at the base of the V. A month after taking delivery of the vehicle, viz. on 21st February 1951, the appellant commenced using it for the purpose of transporting bulk wheat from Benong to Bunbury. He says that on this occasion he noticed that the engine overheated. It was, he says, "well above normal". From that date the truck was in more or less regular use for this purpose until 7th March when on a journey from Nippering to Fremantle the engine ran "very hot". The water in the circulating cooling system was, he said, "near boiling or boiling". The appellant stopped the vehicle and found "paint burnt on the right hand bank". He says that he oooled the motor down and refilled it with water and then recommenced his journey but the condition of the motor became worse and he was obliged to stop the vehicle on other occasions to refill the cooling system with water. When he arrived home he removed the head of the right hand bank of cylinders and found that the cylinder head gasket had blown. He also removed the cylinder head of the left hand bank of cylinders and found that this head, which was of a metal alloy, was corroded and pitted. The right hand cylinder head was said to have been of cast-iron and upon reporting his experience to the respondent's shop foreman the appellant was advised that it was possible that this head had warped

and it was suggested that he should purchase two new cylinder heads. This he did and says that he fitted the new heads on 8th and 9th March. It should be observed at this stage that the manufacturer's warranty extended only to a total load of 29,500 lb. and this was known to the appellant. Since the weight of the truck and the semi-trailer was a little over 5 tons there was a margin for a payload of approximately 8 tons. But in the course of the 9 journeys which the truck had made from 21st February 1951 to 7th March 1951 it had hauled loads weighing from 11 to 14 tons. On the latter date it was employed to haul a load of nearly 13 tons over a journey of approximately 170 miles and partly in hilly country.

After fitting the new cylinder heads the appellant resumed work with his truck on 12th March and on that day he again noticed overheating when nearing Perth on the return journey from Nippering with another load of nearly 13 tons. He noticed also that the engine was misfiring and upon inspection found that there was some water in the oil sump. On the following day he purchased two new thermostats - one for each bank of cylinders. The function of these items of equipment was to prevent full circulation of water in the cooling system until the engine had achieved a predetermined degree of heat and no doubt the new items were purchased because of a belief or suspicion on the part of the appellant that the thermostats already fitted to the engine were continuing to impede the circulation of water in the cooling system after the engine had been warmed up. He fitted the thermostats during the next day and on 14th March he took the vehicle to Kukerin whence he hauled a load of over 14 tons to Fremantle - a distance of some 200 miles. On 16th, 19th and 22nd March he hauled loads of over 13 tons from Kukerin to Fremantle and on the last

of these occasions he again noticed overheating on the journey to the latter place. He made no further trips during the following week and during that period he went to the respondent's premises and "told them of (his) further troubles". As a result the radiator was replaced and the engine was checked. There was further overheating and on 12th April the appellant undertook a shorter journey in the hope that the truck would be able to cope with it. Accordingly he made the journey to Yarramony - a total distance for the return journey of approximately 170 miles. Near Northam on the return journey, the cylinder head gasket on the right hand bank of cylinders blew out. A new gasket was refitted at Northam and the journey was ultimately completed. Later in the same month, it is said, another cylinder head gasket on the right hand bank of cylinders blew out on the journey from Yarramony to Fremantle. On 10th May the appellant went to Botherling - a distance for the single journey of approximately 110 miles. On the journey there the engine overheated and it became necessary now and again to stop and refill the radiator with water. This appears to be the first suggestion in the appellant's evidence of overheating while the truck was being operated without a load and it occurred in the course of the vehicle's thirty-second round journey since its purchase and on what proved to be its last before a new engine was fitted to it. On the return journey the engine overheated to such an extent that it was necessary to leave the truck overnight near Belmont and when the engine was examined the following day it was found that there was some water in the oil sump and that there was a crack in the right hand side of the cylinder block. In these circumstances the engine was useless and it became necessary to replace it and this the appellant subsequently did.

Upon this statement of facts which the learned trial judge accepted there is no doubt that the engine of the vehicle became grossly overheated on a number of occasions and that it was this circumstance which led to its final failure. It may be that the cracking of the cylinder block was accelerated by the introduction of cold water to the cooling system whilst the engine was in an overheated condition, but there can be little doubt that the frequent gross overheating to which it was subject in the course of its work was calculated to render it of no commercial value. Not unnaturally the appellant attributed this characteristic to a defect in the engine itself. When the engine was removed to make way for a replacement there was found behind the water pump on the right hand bank a small piece of rubber, described as a rubber plug, which the appellant says was about 1¼ inches in diameter and about ½ an inch thick. Although it was described as a plug it was not in any fixed position but was said to be lying loose inside the water jacket. To the presence of this object, which should not have been there, the appellant ascribed all his troubles and in his statement of defence, after alleging that "the motor was not of the quality warranted", went on to allege that "by reason of an obstruction in the cooling system of the said motor the same broke down and was unserviceable and became worthless requiring to be completely replaced".

Upon the hearing of the suit a considerable body of evidence was directed to the question whether the presence of the plug had caused, or could have caused, the engine to overheat and in the result the learned trial judge was not satisfied that it had done so. He expressed the view that it was possible that it did but he was not prepared to go further than that. Neither was he prepared to find that the overloading of the vehicle

had produced this condition, and, in the end, he came to the conclusion that the overheating had been caused by some latent defect in the engine which rendered it of unmerchantable quality. Accordingly the appellant succeeded at the trial. On appeal, however, the Full Court took the view that upon the pleadings the appellant was bound to fail unless he established that the presence of the plug was responsible for the overheating which had occurred. Upon consideration of the evidence they agreed with the learned trial judge that this had not been established and accordingly they concluded that judgment should have been entered for the respondent. But whether or not the appellant was so limited by the pleadings they were of the opinion that his claim should fail since the evidence was quite incapable of establishing that the presence of the plug/ or any defect in the engine, as distinct from the overloading of the vehicle, was the cause of the overheating.

Upon the evidence there was ample justification for the finding that the presence of the rubber plug did not cause the engine to overheat. No doubt its presence in the engine must immediately have excited suspicion that it had but the evidence that it did not is so strong, and the evidence that it could have done so is so tentative, that it is impossible to differ from the views expressed by the learned trial judge and by the Full Court on this point. It may be that if no other possible cause presented itself this would be a factor to be weighed very heavily against the evidence called on behalf of the respondent on this aspect of the oase. But this was not the position. On every occasion when the truck was used to transport wheat it was called upon to haul loads grossly in excess of the payload for which it was designed and there is abundant evidence that, in those circumstances, long hauls in hilly country, which must have necessitated extensive running in low gears, would be calculated to

cause considerable overheating. Against this two things were said on behalf of the appellant. In the first place, it is said, that gross overheating occurred only in the right hand bank of the engine and, secondly, that at the time during which the appellant's complaints were made to the respondent, the latter was aware of the circumstances in which the truck was being used and did not then suggest that the overheating had been caused by the haulage of excessive loads. With respect to the first of these matters it may properly be said that the evidence by no means establishes that the overheating was confined to the right hand bank. It may be that overheating would be apparent sooner in the right hand bank for there is evidence that that bank, because of the design of the engine and its appurtenances, tends to run at an appreciably higher temperature than the other but the evidence of the appellant, to which we have already referred, shows clearly that, although this may have been so, the overheating was not confined to it. With respect to the suggestion that the respondent at no time before the trial suggested overloading as a possible cause of the overheating it may fairly be said that the evidence does not show that the respondent was informed or that it knew of the loads for the haulage of which the truck was being employed.

In dealing with the overloading as a possible cause of the overheating which occurred the learned trial judge referred to the fact that the appellant had hauled loads ranging from 11 to 14 tons and, generally loads of 12 or 13 tons. This was, as already appears, greatly in excess of the limits specified by the manufacturer's warranty but his Honour was not greatly impressed by the limit so prescribed and added that it would be surprising if it were not conservatively calculated. The Full Court disagreed with this view. They thought that "the maximum payload a vehicle can safely haul is a <u>desideratum</u>

of great consequence in these days of keen competition between manufacturers who are anxious to demonstrate that their vehicles can haul as great a load, at least, as any other make of vehicle of a similar type". But, whether or not there was a safety margin over and above the manufacturer's maximum loading figure, it is clear that the truck was called upon to haul grossly excessive loads and there is no reason to doubt that it may have been the cause, or at least, a substantial cause of the overheating. Indeed, we are disposed to think that this factor was, at the very least, a substantial cause for not only was there evidence that overloading is a common cause of overheating but it is significant that the appellant's evidence strongly suggests, even if it is not established beyond question, that the overheating occurred on occasions when excessive loads were being carried. The first particular complaint was concerned with the journey on 7th March 1951 from Nippering to Fremantle. The next related to the journey from the same place to the same destination and the overheating was noticed near Perth. On 22nd March 1951 the overheating occurred while "carting from Kukerin to Fremantle". The next occasion was during the journey from Yarramony to Fremantle and the final occasion is said to have been on the return journey with a load of wheat to Fremantle. It seems to us that if the presence of the rubber plug was the cause or a substantial cause of the overheating that condition might have been expected to result whether the truck was operating under load or not. But there is no evidence of any overheating prior to 10th May 1951 except when the truck was carrying a grossly excessive load. On that date there was, as we understand it, some evidence of overheating on the journey to Botherling. But this was the last occasion on which the truck was operated with the original engine and on the return

journey the engine overheated to such an extent that it was left at Belmont for the night. On the following day, as already appears, water was found in the oil sump and the engine block was found to be cracked. The overheating on the outward journey on this occasion may well have resulted from defects which had then developed in the engine as the result of frequent overheating during the previous months. These considerations do not, of course, establish that the overheating was exclusively caused by overloading but they do suggest that it may well have done so and they tend to support the conclusion that the presence of the rubber plug was not a cause.

In these circumstances it becomes unnecessary to consider whether the appellant was bound to fail before the learned trial judge unless he established that the presence of the rubber plug had caused the overheating and subsequent failure of the engine. There are, we think, difficulties in the way of so deciding and these are not diminished by the fact that the appellant's counterclaim was finally amended at the trial and counsel for the parties are not in agreement concerning the issues upon which the case was, thereafter, contested. The facts have, however, been fully discussed before us and we prefer to rest our decision on the view that the appellant failed to establish that the overheating resulted from any defect in the engine or in any lack of suitability of the vehicle, within proper loading limits, for use in the cartage or haulage of wheat. For the reasons given the appeal should be dismissed.